Filed 10/2/12 In re M.B. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re M.B., Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. S.B., Defendant and Appellant.	D061760 (Super. Ct. No. NJ14588)

APPEAL from orders of the Superior Court of San Diego County, Blaine K. Bowman, Judge. Affirmed in part and reversed in part.

S.B. appeals from orders of the superior court making jurisdictional and dispositional findings on a juvenile dependency petition filed by the San Diego Health and Human Services Agency (the Agency) on behalf of her daughter, M.B., currently nine months old. S.B. contends substantial evidence does not support the jurisdictional

and dispositional findings. She also claims the Agency failed to make a proper inquiry of M.B.'s Indian ancestry under the Indian Child Welfare Act (ICWA, 25 U.S.C. § 1901 et seq.). We affirm the jurisdictional findings and dispositional orders of the juvenile court but conditionally reverse the finding that ICWA does not apply and remand with directions to conduct further proceedings on the ICWA issue.

FACTUAL AND PROCEDURAL BACKGROUND

S.B. suffers from posttraumatic stress disorder from past violent relationships and was previously hospitalized under Welfare and Institutions Code section 5150. (All subsequent statutory references are to the Welfare & Institutions Code.) She gave birth to M.B. in December 2011. She admitted using drugs during her pregnancy and tested positive for drugs at the time of M.B.'s birth. When M.B. was about two months old, a store attendant called 911 as M.B.'s father, Matt H., and S.B. argued and struggled over M.B.'s car seat. During the incident, Matt bumped M.B. in the head. S.B. stated that a similar argument occurred about a week earlier.

After the incident, a doctor found M.B. to be healthy with no traumatic marks and no evidence of injury. S.B., however, reported feeling "loopy" and stated that she had been awake for the past three days while self-medicating with marijuana. Although S.B. claimed to be breastfeeding, M.B. tested negative for all substances. Based on this information, the hospital staff made a child abuse hotline report regarding M.B. The Agency investigated the referral but did not detain M.B. at that time.

A few days later, S.B. called 911 because M.B. had not had a bowel movement in the last eight hours. Paramedics arrived and found M.B. to be safe and well, but S.B. was uncooperative, seemed paranoid and described a government conspiracy to take her baby away. S.B. was living with M.B.'s maternal grandmother, Rose, who reported that S.B. was going to take M.B. and return to Matt. The Agency took M.B. into custody due to concerns about S.B.'s mental health and M.B.'s safety while in her care. It filed a petition alleging that M.B. was at substantial risk of serious physical harm or illness based on inadequate supervision. (§ 300, subd. (b).)

At the February 2012 detention hearing, the juvenile court made a prima facie finding that M.B. was a child described by section 300, subdivision (b), and ordered her detained in out-of-home care. The court granted S.B. liberal, supervised visits, and the Agency was ordered to provide S.B. with voluntary services. Although Matt did not want anything to do with the proceedings, the juvenile court appointed him counsel to discuss his options.

The March 2012 jurisdiction/disposition report recommended that M.B. remain in foster care and that S.B.'s visitation continue to be supervised. S.B. admitted that she experienced a pattern of domestic violence with men in her life, but claimed she was eager to move away from Matt. She also admitted using marijuana almost daily during her pregnancy and stated that she used alcohol and LSD in the past. However, she claimed that she was not currently smoking or drinking. S.B. was currently employed as a caretaker and had a history of being able to sustain her family with gainful employment. She visited M.B. once a week and was respectful and appropriate. S.B. was attending an

outpatient treatment program and the social worker reported that S.B. was actively pursuing services. An April 2012 addendum report noted that S.B. was now visiting M.B. twice a week. She had a clean drug test the prior month, was attending weekly Narcotics Anonymous (NA) meetings, had attended two therapy sessions and was scheduled to begin a 52-week domestic violence class.

At the April 2012 contested jurisdiction and disposition hearing, the social worker testified that S.B. was participating in all services recommended in her case plan. The juvenile court found the petition true by clear and convincing evidence, commenting that the domestic violence, drug use and underlying mental health issues created a "volatile situation" that placed M.B. at risk. It removed M.B. from S.B.'s care finding there were no reasonable alternatives to removal, placed her in Rose's home and ordered reunification services for S.B. S.B. timely appealed.

DISCUSSION

I. *Jurisdiction and Dispositional Findings*

A. Standard of Review

A parent may seek review of both the jurisdictional and dispositional findings on an appeal from the disposition order. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249.) When the sufficiency of the evidence to support a finding or order is challenged on appeal, the reviewing court must determine if there is any substantial evidence, that is, evidence which is reasonable, credible, and of solid value to support the

conclusion of the trier of fact. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination, all conflicts are to be resolved in favor of the prevailing party and issues of fact and credibility are questions for the trier of fact. (*In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) " 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citation.]" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394.)

B. Jurisdictional Findings

Section 300, subdivision (b) provides that jurisdiction may be assumed if: "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . ." Under this section, the Agency must show: "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.)

S.B. contends the juvenile court erred in declaring jurisdiction over M.B. based on past acts. She claims that at the time of the jurisdiction hearing there was no current or future risk of harm to M.B. because she was no longer using marijuana, had tested negative for drugs and was no longer seeing Matt. The Agency argues that a showing of a current risk is not necessary for the assertion of jurisdiction. We need not address the Agency's contention because substantial evidence of a defined risk existed at the time of the jurisdictional hearing.

Section 300.2 states that "[t]he provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." "[A] child's ingestion of illegal drugs constitutes 'serious physical harm' for purposes of section 300." (*In re Rocco M., supra*, 1 Cal.App.4th at p. 825.) Additionally, "use of marijuana near others can have a negative effect on them." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452.)

Here, S.B. admitted that she used marijuana during her pregnancy, that M.B. tested positive for drugs at birth, that she used marijuana while breastfeeding M.B., and used "substances" while around M.B. At the time of her altercation with Matt, S.B. stated she was "loopy" and "100 percent under the influence and feeling high." M.B.'s ingestion of marijuana constituted serious physical harm and S.B.'s history of marijuana abuse posed a substantial risk of harm to M.B. because it impacted S.B.'s mental state and her ability to care for an infant. S.B. challenges the juvenile court's implied conclusion that M.B. had ingested drugs, claiming her prior statements were not supported by drug test results. However, it was for the juvenile court to assess S.B.'s credibility, including her statement that, after M.B.'s birth, the hospital social worker "felt comfortable" releasing M.B. to S.B.'s care. (*In re Steve W., supra,* 217 Cal.App.3d at p. 16.)

While S.B. should be commended for her decision to stop using marijuana and end her relationship with Matt, she was in the very early stages of her case plan. She had recently begun therapy and had attended only two therapy sessions. She had a history of violent relationships with men, including a former husband that sexually abused her, but had not yet begun domestic violence classes. Case law establishes that "domestic

violence in the same household where children are living *is* neglect" that constitutes a failure to protect the children "from the substantial risk of encountering the violence and suffering serious physical harm or illness from it." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194.) Because the evidence demonstrated that S.B. had not yet taken steps to address her history of domestic violence, the juvenile court could reasonably infer that a substantial likelihood existed that she would repeat her pattern of violent relationships absent additional services. Accordingly, we conclude that the juvenile court's jurisdictional findings were supported by substantial evidence.

C. Dispositional Findings

S.B. contends the evidence does not support the juvenile court's order removing M.B. from her custody under section 361, subdivision (c)(1). S.B. claims there were reasonable means available to protect M.B. other than removal, such as placing M.B. in her custody and requiring that she live in Rose's home for a few months while the social worker and juvenile court monitored her progress in services and M.B.'s health and safety. We disagree.

A juvenile court has broad discretion to fashion a dispositional order that best serves and protects a child's interest. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006; §§ 245.5, 361, subd. (a), 362.) However, a parent's right to the care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753.) Thus, to justify removal of the child the juvenile court must have clear and convincing evidence (1) that there is a substantial danger to the child's physical well-being and (2) that there is no reasonable way

to protect the child in the parent's home. (§ 361, subd. (c)(1).) Less drastic alternatives to removal may be available in a given case including returning a minor to parental custody under stringent conditions of supervision by the Agency such as unannounced visits. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 529.)

Here, as addressed above, the juvenile court could reasonably conclude that a substantial danger to M.B.'s physical well-being existed based on S.B.'s mental health issues that she was just beginning to address through therapy. Additionally, S.B. had not yet begun to address her history of domestic violence. This evidence similarly supported the juvenile court's finding that there was no reasonable way to protect M.B. absent removal.

S.B. argues that M.B. would have been safe in her care if she stayed in Rose's home and that the trial court erred in not considering other reasonable alternatives to removal. The record does not support S.B.'s assertion.

At the disposition hearing the juvenile court heard from counsel regarding placing M.B. with the maternal grandfather in Georgia, with Rose, or having her remain in foster care. S.B. expressed her desire that M.B. be placed with the maternal grandfather in Georgia, understanding that this placement would impact her visitation. When the juvenile court inquired about placing M.B. with Rose, the social worker stated and S.B.'s counsel confirmed, that S.B. *opposed* that placement.

The juvenile court then asked S.B. if she preferred that M.B. stay in a foster home, rather than being placed with Rose. After taking a recess to allow S.B. to consult with her attorney, S.B.'s counsel clarified that S.B. did not oppose placement with Rose, but wanted an evaluation of the maternal grandfather under the Interstate Compact for Placement of Children (ICPC) to proceed. After confirming that Rose wanted M.B. and that the Agency did not oppose placement with Rose, the juvenile court ruled that M.B. would be detained in the foster home until she could be placed with Rose and ordered the Agency to continue the ICPC evaluation. If the ICPC was approved, the court ordered a ten-day notice period before placing M.B. with the maternal grandfather in Georgia because it believed the Agency was about "a month away" from returning M.B. to S.B.

S.B. now asserts the juvenile court should have required her to move into Rose's home so that she could be with M.B. S.B., however, never suggested this as an option during the hearing, presumably because she had just moved to a new location. On this record, we conclude that the removal order is supported by substantial evidence.

II. *ICWA*

A. Facts

S.B. initially denied having any Indian ancestry. At the detention hearing, S.B.'s attorney indicated S.B. "may" have some Native American heritage through the Shoshone and Cherokee tribes, and she would be filling out the "ICWA long form." Accordingly, the juvenile court deferred determination as to the applicability of ICWA. That same day, S.B. submitted the ICWA-020 form stating she had relatives with Indian ancestry through the "Shoshonee" and Cherokee tribes, including Donald P. B. and

Carolyn B. In April 2012, S.B. submitted the ICWA-030 long form indicating her tribe or band was "unknown" and stating "no known affiliation [with] a tribe." As to all her biological relatives, including Donald P. B. and Carolyn B., her grandfather and grandmother, respectively, S.B. responded "N/A" regarding their tribe or band. The sole exception was to her other biological grandfather, Frank M., Jr., and her paternal great-great grandfather to which she responded "unknown." After reviewing the "long form," the juvenile court held that ICWA did not apply.

B. Analysis

ICWA provides that when a state court "knows or has reason to know that an Indian child is involved" in a juvenile dependency proceeding, the court must give the child's tribe notice of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a); *In re S.B.* (2005) 130 Cal.App.4th 1148, 1157.) California law imposes "an affirmative and continuing duty to inquire" whether a child involved in a dependency proceeding "may be an Indian child." (§ 224.3, subd. (a); also, Cal. Rules of Court, rule 5.481(a) [imposes "an affirmative and continuing duty [on the court and other officials] to inquire whether a child is or may be an Indian child."].) "At the first appearance by a parent" the court is required to order the parent to complete Form ICWA-020. (Cal. Rules of Court, rule 5.481(a)(2).) (All rule references are to the Cal. Rules of Court.) On this form, the parent must declare under penalty of perjury whether the child or the parent has Indian ancestry and whether the child or the parent is a member of an Indian tribe or could be eligible for membership in an Indian tribe. When a social worker "has reason to know that an Indian child is involved, the social worker . . . is required to make further

inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information" required to be provided in the ICWA notice. (§ 224.3, subd. (c); also, rule 5.481(a)(4)(A)].) Thereafter, "the court must send *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) to the parent or legal guardian and Indian custodian of an Indian child, and the Indian child's tribe, ..." (Rule 5.481(b)(1).)

Here, the information on S.B.'s ICWA-020 form suggested that M.B. may be an Indian child, namely "Shoshonee" or Cherokee, through Donald P. B. and Carolyn B. S.B. provided this information under penalty of perjury. Because this form suggested that M.B. might be an Indian child, the social worker was required to interview M.B.'s extended family members to gather the information listed in section 224.2, subdivision (a)(5), to complete the form ICWA-030. (Rule 5.481(a)(4)(A) & (b)(1).) However, there is no evidence in the record indicating that the social workers ever interviewed M.B.'s extended family members. Rather, it appears a social worker gave S.B. a partial copy of form ICWA-030 to complete. On this form, S.B. responded "N/A" regarding the tribe or band for Donald P. B. and Carolyn B.

Based on her responses in form ICWA-030, the Agency asserts S.B. "disavowed" any Indian ancestry. We disagree. Nothing in the record suggests S.B. completed form ICWA-030 under penalty of perjury, or that the social worker asked her about the inconsistency between form ICWA-020 and form ICWA-030. Significantly, form

ICWA-030 is the notice form sent to the tribes and it is required to be signed by the Agency, as the petitioner, under penalty of perjury. (See form ICWA-030 at <http://www.courts.ca.gov/documents/icwa030.pdf>, as of Oct. 2, 2012.) It appears the Agency improperly foisted its duty of inquiry onto S.B., even though the social worker had contact with M.B.'s maternal grandmother and grandfather, Rose B. and Dennis B. Under the circumstances of this case, the Agency's inquiry was inadequate.

We cannot conclude the error was harmless because this is not a case in which there was no indication M.B. had Indian ancestry. (See, e.g., *In re H.B.* (2008) 161 Cal.App.4th 115, 122 [error in inadequate ICWA inquiry harmless where parent never asserted child might have Indian ancestry].) Accordingly, the finding that ICWA does not apply is conditionally reversed and the matter is remanded to the juvenile court with directions to order the Agency to conduct additional investigation to determine whether it is necessary to provide notice in accordance with ICWA. (*In re Damian C.* (2009) 178 Cal.App.4th 192, 199-200 [appellate court declined to reverse jurisdictional and dispositional orders where there was yet an insufficient showing child was an Indian child within the meaning of ICWA].)

DISPOSITION

The jurisdictional findings and dispositional orders are affirmed. The finding that ICWA does not apply is conditionally reversed and the matter is remanded to the juvenile court with directions to order the Agency to conduct additional investigation to determine whether it is necessary to provide notice in accordance with ICWA. If notice is warranted and, after proper notice, the court finds M.B. is an Indian child, the court shall

proceed in conformity with ICWA and advise the parents that they have the right to petition the court to invalidate any action in violation of ICWA. If, after proper inquiry or notice, the court finds M.B. is not an Indian child, the finding that ICWA does not apply shall be reinstated.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.